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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

KEVIN EMBRY, an individual, on behalf
of himself, the general public and those
similarly situated

Plaintiff,

v.

ACER AMERICA CORPORATION;
AND DOES 1 THROUGH 50

Defendants

CASE NO. CV-09-1808 (JW)

**PLAINTIFF'S SUPPLEMENTAL BRIEF IN
SUPPORT OF MOTIONS FOR DISCOVERY
AND APPEAL BOND**

Date: April 30, 2012

Time: 9:00 am

Place: Courtroom 9, 19th Floor

Judge: Hon. James Ware

1 Plaintiff respectfully submits this supplemental brief regarding the status of ap-
 2 peals in the Ninth Circuit, as directed by this Court on April 26, 2012. (N.D. Cal. Dkt.#
 3 247.)

4 **I. INTRODUCTION**

5 Plaintiff has pending two motions related to Objectors Christopher Bandas and Sam Can-
 6 nata: (1) for leave to take discovery (N.D. Cal. Dkt.# 228) and (2) for imposition of an appellate
 7 bond, joint and severally, against Cannata, Bandas and the Law Offices of Darrell Palmer (N.D.
 8 Cal. Dkt.# 232). On April 24, the Court issued an order denying the motions as moot as they
 9 concerned Bandas and the Law Offices of Darrell Palmer, on the grounds that the appeal had been
 10 dismissed. (N.D. Cal. Dkt.# 245.) As the motions were not moot as to objector Sam Cannata,
 11 whose appeal remained pending, Plaintiff immediately notified the Court, and the parties, of his
 12 intent to appear and argue at the scheduled hearing. (N.D. Cal. Dkt.# 246.) The Court then is-
 13 sued an order asking for additional briefing as to the status of the appeals and stated that it would
 14 reconsider its denial of the motions if any appeal remains active. (N.D. Cal. Dkt.# 247.)

15 **II. THE BANDAS APPEAL HAS BEEN DISMISSED BUT A RENEWED** 16 **MOTION TO REINSTATE IS PENDING**

17 The Bandas appeal has been dismissed for failure to prosecute. It is accordingly inactive.
 18 Mr. Bandas has pending a renewed motion to reinstate the appeal. To assist the Court, a copy of
 19 the appellate docket sheet for that appeal is attached hereto as Exhibit A.

20 Bandas' appellate history is as follows. He filed his appeal on March 12, 2012. (N.D.
 21 Cal. Dkt.# 222.) His appeal was assigned appeal number 12-15555. (9th Cir. Appeal No. 12-
 22 15555 Dkt.# 1; N.D. Cal. Dkt.# 223.) He did not pay fees at time of filing. (N.D. Cal. Dkt.# 222
 23 (stating "Appeal fee FEE NOT PAID.") The Ninth Circuit issued an Order on March 22 directing
 24 him to pay the fee within 21 days or show cause why the appeal should not be dismissed. (9th
 25 Cir. Appeal No. 12-15555 Dkt.# 2; N.D. Cal. Dkt.# 229.) He did not pay or respond. On April
 26 18 (27 days later), the Ninth Circuit dismissed the appeal. (9th Cir. Appeal No. 12-15555 Dkt.#
 27 5; N.D. Cal. Dkt.# 233). Mr. Bandas then moved to reinstate the appeal. (9th Cir. Appeal No.
 28 12-15555 Dkt.# 6; N.D. Cal. Dkt.# 243.) The Ninth Circuit denied the motion without prejudice

1 to renewal after he provided proof that he had paid the fee. (9th Cir. Appeal No. 12-15555 Dkt.#
2 8; N.D. Cal. Dkt.# 248.) Mr. Bandas then paid the fee and renewed the motion to reinstate. (9th
3 Cir. Appeal No. 12-15555 Dkt.# 9, 10; N.D. Cal. Dkt.# 249.) His appeal is inactive, though his
4 renewed motion to reinstate remains pending.

5 **III. THE CANNATA APPEAL IS STILL ACTIVE**

6 The Cannata appeal has never been dismissed and remains active. To assist the Court, a
7 copy of the appellate docket sheet for that appeal is attached hereto as Exhibit B.

8 Cannata's appellate history is as follows. He filed his appeal on March 14, 2012. (9th
9 Cir. Appeal No. 12-15663 Dkt.# 1; N.D. Cal. Dkt.# 225). His appeal was assigned appeal
10 number 12-15663. (9th Cir. Appeal No. 12-15663 Dkt.# 1; N.D. Cal. Dkt.# 231.) He also did not
11 pay his fees at the time of filing. (N.D. Cal. Dkt.# 231, stating "Appeal fee FEE NOT PAID.")
12 The Ninth Circuit issued an Order on March 28 directing him to pay the fee within 21 days or
13 show cause why the appeal should not be dismissed. (9th Cir. Appeal No. 12-15663 Dkt.# 2;
14 N.D. Cal. Dkt.# 233.) On March 18, 2012, Cannata paid the fees. (9th Cir. Appeal No. 12-15663
15 Dkt.# 3; N.D. Cal. Dkt.# 242.) No further action has been taken. Cannata's appeal accordingly
16 remains active.

17 **IV. CONCLUSION**

18 Because the Cannata appeal remains active, the Court should now grant Plaintiff's motion
19 for leave to take discovery (N.D. Cal. Dkt.# 228) and motion to impose an appellate bond (N.D.
20 Cal. Dkt.# 332) against Mr. Cannata in the amount of \$346,814.51 or such lesser amount as the
21 Court sees fit.

22 DATE: May 4, 2012

GUTRIDE SAFIER LLP

/s/ Seth A. Safier
Adam Gutride
Seth A. Safier
Attorneys for Plaintiff

Exhibit A

General Docket
United States Court of Appeals for the Ninth Circuit

Court of Appeals Docket #: 12-15555
Nature of Suit: 3890 Other Statutory Actions
 Kevin Embry, et al v. ACER America Corporation
Appeal From: U.S. District Court for Northern California, San Jose
Fee Status: Paid

Docketed: 03/14/2012
Termed: 04/18/2012

Case Type Information:

- 1) civil
- 2) private
- 3) null

Originating Court Information:

District: 0971-5 : [5:09-cv-01808-JW](#)
Court Reporter: Irene Rodriguez, Official Court Reporter
Trial Judge: James Ware, Chief District Judge
Date Filed: 04/24/2009
Date Order/Judgment: 02/14/2012

Date Order/Judgment EOD: 02/14/2012

Date NOA Filed: 03/12/2012

Date Rec'd COA: 03/12/2012

Prior Cases:

None

Current Cases:

	Lead	Member	Start	End
Companion	12-15555	12-15633	03/23/2012	

KEVIN EMBRY, individually and on behalf of himself, the general public and those similarly situated
 Plaintiff - Appellee,

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CHRISTOPHER BANDAS
 Objector - Appellant,

Joseph Darrell Palmer
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 Law Offices of Darrell Palmer
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 Solana Beach, CA 92075

v.

ACER AMERICA CORPORATION, a California corporation
Defendant - Appellee,

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KEVIN EMBRY, individually and on behalf of himself, the general public and those similarly situated,

Plaintiff - Appellee,

CHRISTOPHER BANDAS,

Objector - Appellant,

v.

ACER AMERICA CORPORATION, a California corporation,

Defendant - Appellee.

03/14/2012	<input type="checkbox"/> 1 14 pg, 588.1 KB	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. SEND MQ: Yes. The schedule is set as follows: Fee due from Appellant Christopher Bandas on 03/12/2012. Mediation Questionnaire due on 03/21/2012. Transcript ordered by 04/11/2012. Transcript due 05/11/2012. Appellant Christopher Bandas opening brief due 06/20/2012. Appellees ACER America Corporation and Kevin Embry answering brief due 07/20/2012. Appellant's optional reply brief is due 14 days after service of the answering brief. [8103599] (RT)
03/22/2012	<input type="checkbox"/> 2 10 pg, 573.83 KB	Filed clerk order (Deputy Clerk: DVD): Order to show cause docket fee due. [8113518] (DEV)
04/02/2012	<input type="checkbox"/> 3 3 pg, 134.43 KB	Filed (ECF) Appellant Christopher Bandas Mediation Questionnaire. Date of service: 04/02/2012. [8124001] (JDP)
04/10/2012	<input type="checkbox"/> 4 2 pg, 33.75 KB	Filed order MEDIATION (VLS): This case is under consideration for inclusion in the Mediation Program. Within 14 days of the date of this order, counsel for all parties intending to file briefs in this matter are requested to inform Stephen Liacouras, Circuit Mediator, in writing, by email at stephen_liacouras@ca9.uscourts.gov or fax at (415) 355- 8566, of their clients' views on whether... This communication shall not be served on the opposing party and shall not be filed with the court. The existing briefing schedule remains in effect pending the determination whether the case will be selected for inclusion in the Mediation Program. [8133612] (WL)
04/18/2012	<input type="checkbox"/> 5 2 pg, 81.29 KB	Filed order (Deputy Clerk: DVD) Dismissing case for failure to prosecute (Cir. Rule 42-1) Pursuant to Circuit Rule 42-1, this appeal is dismissed for failure to pay fees. (Order dated 03/22/2012), This order served on the district court shall constitute the mandate of this court. [8145453] (DEV)
04/19/2012	<input type="checkbox"/> 6 11 pg, 204.44 KB	Filed (ECF) Appellant Christopher Bandas Motion to reinstate case after FRAP 42-1 dismissal. Date of service: 04/19/2012. [8146885] (JDP)
04/25/2012	<input type="checkbox"/> 7 59 pg, 2.62 MB	Filed (ECF) Appellee Kevin Embry response opposing motion (,motion to reinstate case after FRAP 42-1 dismissal). Date of service: 04/25/2012. [8153716] (SAS)
04/26/2012	<input type="checkbox"/> 8 1 pg, 26.98 KB	Filed order (Appellate Commissioner) The appellant's opposed motion to reinstate is denied without prejudice to a renewed motion, filed within 21 days after the date of this order, accompanied by proof of payment of the docketing fees. See General Order 2.4, General Orders of the United States Court of Appeals for the Ninth Circuit (a motion to reinstate an appeal should be accompanied by a correction of the deficiency that caused the dismissal.) (Pro Mo) [8155452] (WL)
04/30/2012	<input type="checkbox"/> 9 10 pg, 184.19 KB	Filed (ECF) Appellant Christopher Bandas Motion to reinstate case after FRAP 42-1 dismissal. Date of service: 04/30/2012. [8158349] (JDP)
05/01/2012	<input type="checkbox"/> 10	Received notification from District Court re: payment of docket fee. Amount Paid: USD 455.00. Date paid: 05/01/2012. [8160431] (RT)
05/02/2012	<input type="checkbox"/> 11 60 pg, 2.65 MB	Filed (ECF) Appellee Kevin Embry response opposing motion (,motion to reinstate case after FRAP 42-1 dismissal). Date of service: 05/02/2012. [8162453] (SAS)

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Transaction Receipt			
U.S. Court of Appeals for the 9th Circuit - 05/03/2012 10:39:16			
PACER Login:	ss2414	Client Code:	
Description:	Docket Report (filtered)	Search Criteria:	12-15555
Billable Pages:	2	Cost:	0.20

Exhibit B

General Docket
United States Court of Appeals for the Ninth Circuit

Court of Appeals Docket #: 12-15633 Nature of Suit: 3890 Other Statutory Actions Kevin Embry, et al v. ACER America Corporation Appeal From: U.S. District Court for Northern California, San Jose Fee Status: Paid	Docketed: 03/23/2012
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Case Type Information:

- 1) civil
- 2) private
- 3) null

Originating Court Information:
District: 0971-5 : [5:09-cv-01808-JW](#)
Court Reporter: Irene Rodriguez, Official Court Reporter

Trial Judge: James Ware, Chief District Judge

Date Filed: 04/24/2009

Date Order/Judgment:

02/14/2012

Date Order/Judgment EOD:

02/14/2012

Date NOA Filed:

03/14/2012

Date Rec'd COA:

03/14/2012

Prior Cases:

None

Current Cases:

	Lead	Member	Start	End
Companion	12-15555	12-15633	03/23/2012	

KEVIN EMBRY, individually and on behalf of himself, the general public and those similarly situated
 Plaintiff - Appellee,

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SAM P. CANNATA
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v.

ACER AMERICA CORPORATION, a California corporation
Defendant - Appellee,

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KEVIN EMBRY, individually and on behalf of himself, the general public and those similarly situated,

Plaintiff - Appellee,

SAM P. CANNATA,

Objector - Appellant,

v.

ACER AMERICA CORPORATION, a California corporation,

Defendant - Appellee.

- 03/23/2012 ☐ [1](#)
18 pg, 228.87 KB DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL AND PRO SE APPELLANT. SEND MQ: No. The schedule is set as follows: Fee due from Appellant Sam P. Cannata on 03/14/2012. Transcript ordered by 04/13/2012. Transcript due 05/14/2012. Appellant Sam P. Cannata opening brief due 06/22/2012. Appellees ACER America Corporation and Kevin Embry answering brief due 07/23/2012. Appellant's optional reply brief is due 14 days after service of the answering brief. [8114858] (RT)
- 03/28/2012 ☐ [2](#)
2 pg, 99.46 KB Filed clerk order (Deputy Clerk: CKP): A review of the district court docket reflects that appellant has not paid the docketing and filing fees for this appeal. Within 21 days from the date of entry of this order, appellant shall: (1) file a motion with this court to proceed in forma pauperis; (2) pay \$455.00 to the district court as the docketing and filing fees for this appeal and provide proof of payment to this court; or (3) otherwise show cause why the appeal should not be dismissed for failure to prosecute. If appellant fails to comply with this order, the appeal will be dismissed automatically by the Clerk under Ninth Circuit Rule 42-1. [8119424] (CKP)
- 04/23/2012 ☐ [3](#)
Received notification from District Court re: payment of docket fee from objector -appellant Sam P. Cannata. Amount Paid: USD 455.00. Date paid: 04/23/2012. [8149442] (RT)

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U.S. Court of Appeals for the 9th Circuit - 05/03/2012 10:40:02			
PACER Login:	ss2414	Client Code:	
Description:	Docket Report (filtered)	Search Criteria:	12-15633
Billable Pages:	1	Cost:	0.10

PROOF OF SERVICE

I, Seth A. Safier, declare:

My business address is 835 Douglass, San Francisco, California. I am employed in the County of San Francisco, where this mailing occurs. I am over the age of 18 years and not a party to the within cause.

On May 4, 2012, I served the following documents:

PLAINTIFF'S SUPPLEMENTAL BRIEF IN SUPPORT OF MOTIONS FOR DISCOVERY AND APPEAL BOND

on the following person(s) in this action by placing a true copy thereof as follows:

Jeff McFarland (jeffmcfarland@quinnemanuel.com)	Sam P. Cannata
Stan Karas (skaras@quinnemanuel.com)	Cannata Phillips LPA, LLC
Quinn Emanuel Urquhart & Sullivan, LLP	9555 Vista Way, Ste. 2000
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Joseph Darrell Palmer
Law Offices of Darrell Palmer
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☒ BY EMAIL DELIVERY. I caused said documents to be delivered by ECF to the above-mentioned persons.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct and that this document was executed on May 4, 2012, at San Francisco, California.

/s/ Seth A. Safier

Seth A. Safier, Esq.